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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID G. CIULLA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR WRIT OF CERTIORARI

DAVID D. JIVIDEN
Captain, Office of
The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg. 5683
Bolling AFB, DC 20332-6128
Counsel of Record

JEFFREY R. OWENS
Lieutenant Colonel, Office of
The Judge Advocate General
United States Air Force
Counsel for Petitioner

JULY 1991

QUESTION PRESENTED

Whether the petitioner's right to due process of law was violated both when the military judge, over defense objection, considered uncharged misconduct in determining petitioner's sentence, and when courts of appellate review used the admission of the uncharged misconduct for a different basis than that used by the military judge.

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IN THE

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DAVID G. CIULLA,

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UNITED STATES OF AMERICA,

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Petition for Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

The petitioner, David G. Ciulla, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on April 11, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 32 M.J. 186 (C.M.A. 1991), in which Senior Judge Everett concurred in part and dissented in part (Appendix A). The United States Air Force Court of Military Review issued a decision on November 16, 1989, reported at 29 M.J. 868 (A.F.C.M.R.) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on April 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1989) and 10 U.S.C. § 867 (h) (Supp. 1990).

CONSTITUTIONAL AND RULE FOR COURTS-MARTIAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

Rule for Courts-Martial 1001(b)(4), Manual for Courts-Martial, United States, 1984 provides in relevant part:

> (4) *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

STATEMENT OF THE CASE

On 30 November 1988, the petitioner, an Air Force staff sergeant (E-5), was tried by a general court-martial in a judge alone trial at McChord Air Force Base, Washington. He pled guilty to charges of forceable sodomy and the commission of indecent acts upon his natural daughter, a child under 16 years of age. He was initially sentenced to a dishonorable discharge, confinement for 40 years, and reduction to airman basic (E-1). The Air Force Court of Military Review affirmed the findings but reduced his confinement to 30 years on 16 September 1989.

During the presentencing portion of the appellant's trial, his natural daughter testified for the prosecution. During her direct examination by trial counsel, defense counsel objected to the relevancy of trial counsel's inquiry as to whether "during the time he was doing these things to you," the petitioner ever said "anything to you about doing these things to other girls?" Trial counsel stated the inquiry was relevant as to the determination of specific deterrence and protection of other victims. The trial judge allowed the question based on the offered relevance,

stating he would be able to separate out anything that's overly prejudicial." Petitioner's daughter then related that petitioner, on one occasion, asked her if she would mind if he "[did] it" to a friend of hers and see her friend naked.

The Air Force Court of Military Review found that this evidence was admissible "as part and parcel of the circumstances surrounding the [petitioner's] offenses against his daughter," *United States v. Ciulla*, 29 M.J. 868, 869-70 (A.F.C.M.R. 1989). The Court of Military Appeals affirmed the decision of the United States Air Force Court of Military Review on any one of three grounds. First, the objection was waived, as it was not "at all clear" that the trial judge considered the information for any purpose, and that it was "incumbent upon the defense to seek clarification prior to the time sentence was announced." *United States v. Ciulla* 32 M.J. 186, 187 (C.M.A. 1991). Second, admission of the testimony constituted harmless error as to punishment, "given the magnitude of appellant's offenses against the victim, we see no danger that this bit of testimony affected his punishment." *Id.* Third, the testimony was, "state-of-mind/depth-of-problem" evidence directly related to the charged offenses. *Id.* Both lower courts of review affirmed the finding and sentence based on a theory of admissibility regarding the petitioner's statements distinct from that theory of admissibility asserted by prosecution and utilized by the military judge at trial.

REASONS FOR GRANTING THE WRIT

By overruling the defense objection and considering the petitioner's uncharged misconduct, the petitioner's due process rights were violated, rendering his sentencing trial fundamentally unfair. In *Spencer v. Texas*, 385 U.S. 554 (1967), this Court first recognized that the due process clause guarantees the fundamental elements of fairness in a criminal trial. Later, in *United States v. Trombetta*,

467 U.S. 479, 485 (1984), this Court noted that "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." In a case preceding both decisions, the constitutional concept of due process of law was extended to military members, as Congress, through its passage of a Uniform Code of Military Justice, (U.C.M.J.), United States, 1951, granted military accused rights parallel to those awarded to defendants in civilian courts. *United States v. Clay*, 1 C.M.R. 74 (C.M.A. 1951).

The President, pursuant to the statutory authority granted to him by Congress, *see* Article 36(a), U.C.M.J., 10 U.S.C. § 836(a) (1988), promulgated R.C.M. 1001(b)(4), authorizing trial counsel to present evidence as to any aggravating circumstances directly related to or resulting from the offenses for which an accused has been found guilty. The Drafter's Analysis to this Rule made clear that R.C.M. 1001(b)(4) does not authorize introduction in general of evidence of bad character or uncharged misconduct, rather, the evidence sought to be introduced in sentencing must be of circumstances directly relating to or resulting from an accused's offenses. Manual for Courts-Martial, United States, 1984, Analysis, A21-61. The uncharged misconduct reflected in the petitioner's colloquy with his daughter does not fall within the ambit of R.C.M. 1001(b)(4)'s provisions. Specifically, it does not reflect admissible state-of-mind/depth of problem evidence directly related to the charged offenses.

The petitioner's statements were indicative of his untowed interest for another girl, and were not an integral part of a criminal course of conduct which served to explain how he attempted to carry out his offenses, as were the statements by the accused in *United States v. Silva*, 21 M.J. 336, 337 (C.M.A. 1988). Likewise, the petitioner's questions of his daughter did not deal with prior acts of sodomy with the victim or another sibling,

as was the case in *United States v. Mullens*, 29 M.J. 389, 400 (C.M.A. 1990). Moreover, unlike the judge in *United States v. Martin*, 20 M.J. 227, 230 (C.M.A. 1985), the military judge *sub judice* did not conclude on the record that the petitioner's statements were so ambiguous as to have very little weight. In sum, the uncharged misconduct in this case was not admissible under R.C.M. 1001 (b) (4) for purposes of sentencing the appellant. As noted by Senior Judge Everett in his opinion below, "evidence of uncharged misconduct is not admissible in aggravation no matter how similar it might be to the charged offenses —unless it *literally directly relates to* or *results from* the charged offenses. *United States v. Ciulla*, 32 M.J. 186, 188 (C.M.A. 1991) (Everett, Senior J., concurring in part, dissenting in part) (emphasis in original). The petitioner's sentence was therefore arrived at in contravention of R.C.M. 1001(b) (4), violating his due process rights. *Cf., United States v. Caceres*, 440 U.S. 741 (1971) (Noting that when compliance with a regulation is mandated by the Constitution or Federal Law it should be judicially enforced).

The other two bases for the Court of Military Appeals affirmance below are likewise in error. Despite the court's statement to the contrary, the military judge did in fact consider the uncharged misconduct based on the offered relevance by trial counsel. The judge found the uncharged misconduct relevant, and stated he would consider it. He never waivered from this finding, noting on the record that he would if he should later find the evidence irrelevant; "based on the offered relevance at this point I will allow the matter to proceed until I determine, if all, that it is not relevant." *Ciulla, supra* at 187. Defense counsel's objection comported with the procedural requirements set forth in Mil.R.Evid. 103(a) (1) and was therefore not waived for purposes of appellate review. The Court of Appeals' assertion that it was incumbent on defense counsel to "seek clarification" of the judge's rul-

ing under pain of waiver created an unauthorized and novel procedural rule which affected the substantive rights of the petitioner in contravention of the clear standard authorized by Congress and promulgated by the President in Mil.R.Evid. 103(a)(1). As noted by Senior Judge Everett in his opinion below, "[i]f the military judge elects to defer his ruling until he has a fuller picture of the case, it seems to me that it is the *judge's* responsibility ultimately to ensure that he does enter his ruling—not the *defense's* burden to enter a *second* objection when, in reality, a ruling to the *first* is yet outstanding." *Id.* at 187-88.

The petitioner was manifestly prejudiced by the military judge's improper consideration of the uncharged misconduct prior to sentencing. As this Court noted, uncharged misconduct is generally recognized to have the potentiality for prejudice, and is generally excluded except when admitted pursuant to certain well established exceptions. *Spencer*, *supra*, at 560. A sentence should be based on the offenses of which an accused stands convicted. Thus, one based on uncharged misconduct would not be appropriate and so should not be properly affirmed under Article 66(c), U.C.M.J., 10 U.S.C. § 866(c) (1988).[1] *United States v. Kinman*, 25 M.J. 599 (C.M.A. 1987). The petitioner's severe sentence was imposed after inadmissible uncharged misconduct was considered by the military judge. Both lower appellate courts improperly affirmed the sentence, thereby failing to rectify the fundamental unfairness of the petitioner's sentencing trial.

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[1] Article 66(c) of the Uniform Code of Military Justice, 10 U.S.C. § 866(c) provides:

> In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. . .

Each of the lower appellate courts admitted the uncharged misconduct on a basis distinct from that for which it was erroneously admitted at trial by the military judge.[2] The petitioner's trial was therefore rendered unfair on that basis as well. *Sheppard v. United States*, 290 U.S. 90 (1933); *United States v. Watkins* 21 M.J. 224, 226, n. 2 (C.M.A. 1986).

CONCLUSION

The President, pursuant to congressional mandate, authorized the admission of aggravation evidence only within the parameters of R.C.M. 1001(b)(4). Despite timely objection pursuant to Mil.R.Evid. 103(a)(1), the military judge improperly considered the petitioner's uncharged misconduct, which was inadmissible under R.C.M. 1001(b)(4), in arriving at a sentence. The petitioner's sentencing trial was thus rendered fundamentally unfair, and his sentence was improper under Article 66(c), U.C.M.J., 10 U.S.C. § 866(c) (1988). The petitioner further submits that he has also suffered a denial of due process of law when, on appellate review, the uncharged misconduct was used for a different basis then that admitted by the trial judge. This Court should grant the petition for writ of certiorari to insure that the military justice system, so carefully crafted by both presidentially promulgated Rules for Courts-Martial and congressional statute, will again be allowed to protect the due process rights, not only of the petitioner, but of all service members.

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[2] The trial judge's ruling ran afoul of R.C.M. 1001(b)(5), which prohibits extrinsic evidence of uncharged misconduct in order to show the presence or absence of an accused's rehabilitation potential. *United States v. Wingart*, 21 M.J. 127 (C.M.A. 1988).

Respectfully submitted,

DAVID D. JIVIDEN
Captain, Office of
The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg. 5683
Bolling AFB, DC 20332-6128
Counsel of Record

JEFFREY R. OWENS
Lieutenant Colonel, Office of
The Judge Advocate General
United States Air Force
Counsel for Petitioner

JULY 1991

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 64,058
ACM 27528

UNITED STATES,
Appellee,

v.

DAVID G. CIULLA, Staff Sergeant, U.S. Air Force,
Appellant.

Argued Jan. 9, 1991

Decided April 11, 1991

For Appellant: *Captain David D. Jividen* (argued); *Major Ronald G. Morgan* (on brief); *Colonel Richard F. O'Hair, Lieutenant Colonel Jeffrey R. Owens, Captain Mark R. Land.*

For Appellee: *Major Brenda J. Hollis* (argued); *Major Paul H. Blackwell, Jr.* and *Captain David G. Nix* (on brief); *Colonel Robert E. Giovagnoni.*

Opinion of the Court

COX, Judge:

Appellant challenges the propriety of the military judge's receipt of certain presentencing evidence in this judge-alone trial.[1]

---

[1] As framed by appellant, the issue is:

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ALLOWING

Appellant pleaded guilty to committing sodomy and indecent acts upon his natural daughter, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 USC §§ 925 and 934, respectively. The *charged* conduct to which appellant judicially confessed—staggering in both quantum and degree—occurred while the child was between the ages of 10 and 13.[2] Upon a detailed providence inquiry, the military judge accepted appellant's pleas and found him guilty. Prior to pronouncing sentence, the judge heard expert testimony about the massive psychological damage suffered by the victim.

The military judge sentenced appellant to a dishonorable discharge, confinement for 40 years, and reduction to E-3. The convening authority approved the sentence. The Court of Military Review reduced the confinement to 30 years, but otherwise affirmed the findings and the sentence, noting that it had "found no Air Force case for which similar child abuse offenses—however heinous—includ[ed] such a lengthy term of confinement." 29 M.J. 868, 870 (1989).

The issue on appeal relates to a brief exchange that occurred on sentencing between trial counsel and the victim. Trial counsel was permitted to ask the victim this question, over defense objection based on relevance:

> [D]uring the time that dad was doing these things to you, did dad ever say anything to you about doing these things to other girls?

THE VICTIM TO TESTIFY TO APPELLANT'S EXPRESSED DESIRE TO SEE A FRIEND OF THE VICTIM'S NAKED AND TO COMMIT INDECENT ACTS WITH THAT FRIEND.

[2] In addition, the victim testified, without defense objection, that the abuse began with inappropriate touching in the bathtub when she was about 2 years old; it escalated to full sodomy when she was in the second or third grade; and it continued unabated to age 13, at which point she finally reported it to her mother.

The military judge's rationale for permitting the question was:

> Well, I believe I'm able to separate out anything that's overly prejudicial and will not consider it in an undue fashion, but, based on the offered relevance at this point I will allow the matter to proceed *until I determine, if at all, that it is no relevant.*

(Emphasis added.)

In response to the question, the victim testified that, on one occasion during the period in question, appellant expressed a desire to "do it" to one of her friends and to see this other girl naked. That was the extent of the challenged testimony; its propriety was never again addressed insofar as we can determine.

We resolve this case on any of three grounds. First, it is not at all clear that the military judge considered the information for any purpose. Given the tentative nature of the judge's ruling, it was incumbent upon the defense to renew the objection and seek clarification prior to the time sentence was announced. The objection was thus waived.

Second, nothing would seem less surprising than to learn that one who had been sexually abusing his own daughter for years might entertain similar fantasies about other young girls. The expert testified to the same effect in any event. Given the magnitude of appellant's offenses against the victim, we see no danger that this bit of testimony affected his punishment.

Third, "aggravating circumstances directly relating to . . . the offenses of which the accused has been found guilty" may be introduced by the prosecution on sentencing. RCM 1001(b)(4), Manual for Courts-Martial, United States, 1984. As we have construed it, this type of state-of-mind/depth-of-problem evidence was directly related to the charged offenses. *United States v. Mullens*,

29 MJ 398 (CMA 1990), *citing United States v. Silva*, 21 MJ 336 (CMA 1986), and *United States v. Martin*, 20 MJ 227 (CMA 1985), *cert. denied*, 479 U.S. 917, 107 S.Ct. 323, 93 L.Ed.2d 295 (1986).

The decision of the United States Air Force Court of Military Review is therefore affirmed.

Chief Judge SULLIVAN concurs.

EVERETT, Senior Judge (concurring in part and dissenting in part):

I agree that, given the nature of the military judge's response to the initial objection, it is not clear that he ultimately considered the challenged evidence for any purpose at all. I am not so sure as the majority, though, that the burden of definitively resolving the matter on the record rested with the defense and that, otherwise, the defense can be charged with waiving the issue.

Mil.R.Evid. 103(a)(1), Manual for Courts-Martial, United States, 1984, requires an objection to evidence if later complaint is to be heard on appeal; the defense entered such an objection here. If the military judge elects to defer his ruling until he has a fuller picture of the case, it seems to me that it is the *judge's* responsibility ultimately to ensure that he does enter his ruling—not the *defense's* burden to enter a *second* objection when, in reality, a ruling to the *first* is yet outstanding.

In any event, even considering the severe sentence adjudged and approved, I am convinced that the challenged evidence played no significant role in the adjudged sentence and that, certainly, any arguable effect does not continue to be reflected in the approved sentence. *See* Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

I am compelled, however, to reiterate my disagreement with the willingness of my Brothers on this Court to encompass such evidence as that in question here within

"aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." *See* RCM 1001(b)(4), Manual, *supra*. I have expressed my views on this language in my separate opinions in each of the cases cited by the majority: Quite simply, I believe that evidence of uncharged misconduct is not admissible in aggravation—no matter how *similar* it might be to the charged offenses—unless it *literally directly relates to* or *results from* the charged offenses. Indeed, I strongly urge that anyone interested in this conflict read carefully the three cases out of Court of Military Review that are cited in the Drafters' Analysis to reflect what *they* intended by this language in this rule. Manual, *supra* at A21-64 (Change 3).

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27528

UNITED STATES

v.

STAFF SERGEANT DAVID G. CIULLA, FR 119-44-5998,
United States Air Force

Sentence Adjudged 30 Nov. 1988

Decided 16 Nov. 1989

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Mark R. Land.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Terry M. Petrie, Major Jeffrey H. Curtis and Captain David G. Nix.

Before BLOMMERS, KASTL and MURDOCK, Appellate Military Judges.

DECISION

KASTL, Senior Judge:

The appellant was found guilty of sodomy and indecent acts with his natural daughter, in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934. His sentence is a dishonorable discharge, confinement for 40 years, and reduction to airman first class.

At a bench trial, the appellant pleaded guilty to the offenses charged. During his guilty plea inquiry as to

sodomy, he specifically admitted that he forced his daughter to perform fellatio upon him. As part of its case-in-chief, the prosecution then sought to prove further acts of sodomy in that he had performed cunnilingus upon her as well. The Government was successful in this effort, based largely on the testimony of the child victim.

Following findings of guilty, the Government recalled the appellant's daughter during the presentencing portion of the court-martial. The prosecutor asked her whether the appellant had ever voiced a desire to perform illegal acts upon other girls. The defense immediately objected to the question on the basis of relevancy. Trial counsel's response emphasized the "relative risk of this person should he be put back out into society." After the military judge stated that he would separate out "anything that's overly prejudicial," the questioning continued:

> TC: During the time that your dad was doing these things to you that we talked about earlier, did he ever talk about doing those kinds of things to other girls?
>
> Witness: Yeah, once. One girl.
>
> TC: What did he say?
>
> Witness: He said, do you mind if I do it to your friend [D], and I said no, I don't want you to do it.
>
> TC: And what was he going to do?
>
> Witness: Cause, like this, if—he goes, do you mind if I see her naked? And, that's all he said, though.

The appellant argues that the military judge erred by allowing this testimony as to the appellant's desires with [D]. We find no error and affirm the findings.

Uncharged Misconduct or "Facts and Circumstances?"

Citing *United States v. Wingart*, 27 M.J. 128, 135 (C.M.A.1988) the appellant argues that his fantasy as to [D] was uncharged misconduct; after findings of guilty

have been entered, he argues, such uncharged misconduct is no longer of consequence unless it constitutes aggravation evidence under R.C.M. 1001(b)(4).

We find the evidence in question clearly admissible under R.C.M. 1001(b)(4) as an integral part of the appellant's criminal course of conduct. Regardless of the plea, the prosecution is permitted after findings of guilty to present evidence directly related to the offenses for which the accused is to be sentenced. *United States v. Vickers*, 13 M.J. 403 (C.M.A.1982); *United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981); *United States v. Carfang*, 19 M.J. 739 (A.F.C.M.R.1984), *pet. denied* 21 M.J. 112 (C.M.A.); *United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R.1984). We find it noteworthy that the Analysis on this point (MCM, 1984, Appendix 21, page A 21-64) cites *United States v. Rose*, 6 M.J. 754 (N.C.M.R. 1978) as illustrative of the rule. In *Rose*, evidence of subsequent sexual acts was held admissible to show aggravated circumstances of the crimes with which the accused was charged.

During oral argument, appellate defense counsel sought to distinguish the concept behind the cited cases. The defense recognized the premise that an expanded factual account might be admissible as the *res gestae* or "facts and circumstances" which surround commission of an offense. However, the defense insists, the disputed evidence in the present case is distinguishable because it entered through an entirely different door—*to prove that this individual was a danger to society.*

We need not wrestle at length with this defense contention. As the Court of Military Appeals recently commented, there would be little point in granting relief "if the challenged evidence *clearly would be admissible at a rehearing*" (emphasis added). *United States v. Wingart*, 27 M.J. at 134. In any event, we find the evidence in question admissible as part and parcel of the circum-

stances surrounding the appellant's offenses against his daughter. In addition to the cases already cited, *see United States v. Silva*, 21 M.J. 336 (C.M.A. 1986); *United States v. Pitts*, 18 M.J. 522 (A.F.C.M.R.1984) *pet. denied* 19 M.J. 126 (C.M.A.1984) and *United States v. Dagger*, 23 M.J. 594 (A.F.C.M.R.1986) *pet. denied* 25 M.J. 241 (C.M.A.1987) *See also* DA Pam 27-173, *Trial Procedure* (15 Feb 1987) paragraph 25-5e(2). It follows that—whether the defense contention is correct that the evidence was inadmissible for the reasons stated by trial counsel—it was clearly admissible to show the circumstances surrounding the commission of the crimes.[1]

We find the facts of this case clearly distinguishable from those in *United States v. Wingart*, a lynchpin of the defense effort. In *Wingart*, the Court of Military Appeals found the military judge erred in admitting slides "of a former young neighbor girl who was an Air Force dependent . . . in various stages of undress and in provocative poses." The photographs had been discovered by the appellant's ex-wife *approximately three years earlier*. *United States v. Wingart*, 27 M.J. at 131. Stale, three-year old material is a far cry from the probative "facts and circumstances" data present in the instant case.[2]

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[1] Appellate Government counsel insist that the testimony was perfectly admissible as relevant aggravating evidence, probative on the issues of treatment and length of confinement. In particular, the prosecution emphasizes, the *subsequent* testimony of Dr. Nancy Slicner, a child psychologist, shows that when children from inside the home reach a safe haven, other children might be at risk unless the offender has been placed into a good treatment program.

[2] Because of our disposition of this evidentiary issue, we need not address the proposition that any possible legal error would be harmless. As to this matter, we note that this appellant was found guilty of indecent acts occurring over a two and one-half year period. His crimes included fellatio and cunnilingus, fondling his daughter, masturbating in front of her, rubbing his penis against her anus and rubbing her vaginal area with a feather duster. This abuse occurred almost daily. The appellant called his child a tramp and a whore; he threw money at her. She testified that she feared

Sentence Appropriateness

We now address the matter of appropriateness of sentence. The appellant was subject to a dishonorable discharge, 54 years of confinement, and accessory penalties. The military judge sentenced him to a dishonorable discharge and 40 years confinement; he imposed no forfeitures and reduced the appellant to airman first class.

It has been aptly said that it is no accident that Justice holds the scales in one hand and the sword in the other. The sword without the scales is brute force; the scale without the sword is but empty theory. Both belong together.[3] We observe that there is perhaps no type of offense more repugnant than sexual abuse involving one's own child. In our review of an appropriate sentence, we have found no Air Force case for which similar child abuse offenses—however heinous—include such a lengthy term of confinement. *See*, for example, *United States v. Saul*, 26 M.J. 568, 575 (A.F.C.M.R.1988). Considering the entire record, we find appropriate only so much of the sentence as extends to a dishonorable discharge, confinement for 30 years, and reduction to airman first class.

The findings of guilty and the sentence as modified, are

AFFIRMED.

Senior Judge BLOMMERS and Judge MURDOCK concur.

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him as a violent individual. It is indeed difficult to imagine many acts more vile between a parent and child. Furthermore, the victim has been in therapy and still has frequent nightmares. Dr. Slicner, a government witness, testified that the victim will have a difficult time overcoming the abuse in the future. Dr. Slicner further opined that this was one of the most severe cases she had seen in her extensive work with child abuse victims.

[3] *See* R. Von Ihering, *The Struggle for Law* (Chicago; 1897) pp. 1-2.

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